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No. 86-637

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

COMMUNICATIONS WORKERS OF AMERICA AND
ITS LOCALS 2100, 2101, 2108 and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 89 national and international unions representing approximately thirteen million working men and women, submits this brief *amicus curiae* with the consent of the parties as provided by in the rules of this Court.

SUMMARY OF ARGUMENT

The showing by petitioners Communications Workers of America et al. ("CWA") and by the United States as *amicus curiae* that, in enacting and amending the National Labor Relations Act, Congress decided to leave unions free to negotiate union security agreements requiring all persons represented by a union to pay an amount equal to union dues suffices to establish that the court below erred in holding that CWA violated that Act by negotiating precisely such an agreement. It is nonetheless useful, we believe, in approaching this statutory issue to bear in mind the extent to which Congress, in shaping the NLRA, has established safeguards to protect the interests of persons who do not wish to support a union and, equally important, to understand the fundamental considerations which support Congress' decision not to grant such individuals the type of right plaintiffs here claim. The AFL-CIO therefore submits this brief to make clear what Congress has done in this area and the practical wisdom of Congress' decisions.

In several different respects, the NLRA and the subsequently-enacted Labor-Managemnt Reporting and Disclosure Act of 1959 ("LMRDA") limit what can be demanded of nonmembers and also extend significant rights to nonmembers as against unions. To begin with, under the Act, individuals who do not wish to support a union can be obligated to do os only if a more-or-less homogeneous group of which such individuals are a part decides democratically that all mebers of the group should owe such obligations to the group. Furthermore, where these conditions are satisfied, nonmmebers can be required to do nothing more than pay the initiation fees and dues required of members. In addition, federal law seeks to assure that the dues union receive will be used to forward the interests of those the union represents, and federal law prohibits the use of such dues to make political contributions or expenditures in federal

eletcions. And finally, federal law assures nonmmebers who may be required to support a union that their interests will be fairly represented by that union. Pp. 8-11 *infra.*

At the same time, the statutory scheme Congress crafted protects the interest of the majority, and the public interest in labor peace, by leaving the majority free to require that all those in the bargaining unit provide the same quantum of financial support to the union. To engraft upon this scheme a provision granting those who object to supporting a union the right to refuse to contribute to those activities "not germane to the union's duties as collective bargaining agent," *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984), would upset the careful balance Congress struck between majority and minority rights. This is true in at least three respects.

First, a rule that grants a discount to aynone claiming an objection to paying union dues inevitably will tempt some to assert an objection for the cost savings that result, for bargaining leverage in getting his way on demands made on the union, or as a sanction against the union for refusing to acceded to a particular demand. Such a discount affects not only the overall financial situations of unions (and especially the ability of unions to undertake activities which generate the right to make an objection) but also the conduct of the union's internal affairs. Pp. 12-14 *infra.*

Second, in any regime in which objectors are required to support only "germane" activities, the government ultimately must put its own gloss on the scope of the union's "duties" as exclusive representative and, moreover, on which activities are reasonably related to those duties. That is not a task for which courts are well-suited; the unhappy history of standardless, judicial superintendence of the affairs of labor unions provides ample support for Congress' disinclination to assign such tasks to those outside the union. Pp. 14-17 *infra.*

Third, a rule granting objectors the right to refuse to contribute to certain union activities necessarily generates large transaction costs—costs which take away from the resources available to the union to perform its principal mission, that of advancing the employment interests of the workers the union represents. Because the concept of "germane" and "non-germane" expenditures is a legal concept of highly particularized significance and not a bookkeeping or accounting concept of general utility to unions in ordering their affairs in a rational and efficient manner, in the normal course unions have no occasion to maintain their books and records in such a way as to separate out germane and non-germane expenditures. A rule allowing a union to charge objectors only for "germane" activities thus necessarily requires the union to establish a system that permits the segregation of germane expenditures, and requires the union to do the financial analysis each year to determine the proportion of expenditures devoted to germane activities. Pp. 17-21 *infra.*

Furthermore, because the largest proportion of virtually every union's budget goes to compensate employees who engage in a range of activity, some of which is chargeable to objectors and others of which is not, a union will be completely confident of its ability to establish to the satisfaction of a third party the proportion of its expenditures devoted to germane activities only if the union institutes some form of time keeping for its officers and employees and then analyzes these time records annually. The costs and burdens of doing so are considerable. Pp. 21-22 *infra.*

Finally, if objectors are given a right not to contribute to germane activities, the objectors likewise must be given the right to challenge the union's determination of what proportion of its expenditures are germane. And because objectors are able to obtain free legal assistance to mount such challenges, it is in their interest to press such litigation without regard to its cost, or to the amount of

money at stake for the objectors. As a result, the expense of objector litigation to unions can dwarf even the heavy record-keeping costs and can tax union resources to and beyond their limits. Pp. 22-26 *infra*.

In sum, in enacting the NLRA, Congress soundly balanced competing interests and arrived at an accommodation which affords significant protection to objectors yet at the same time avoids the degree of judicial oversight and the high level of transaction costs that would necessarily follow if objectors were afforded the right to refuse to contribute to "non-germane" activities.

ARGUMENT

IN ENACTING AND AMENDING THE NATIONAL LABOR RELATIONS ACT CONGRESS CAREFULLY BALANCED THE COMPETING INTERESTS IMPLICATED BY UNION SECURITY AGREEMENTS

A. Writing for the Court in *Carpenters' Union v. Labor Board*, 357 U.S. 93, 99-100 (1958), Justice Frankfurter, in words the Court has quoted since on several occasions,[1] observed that "the Taft-Hartley Act was to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." The instant case illustrates the truth of that observation.

As the brief of petitioners Communications Workers of America et al ("CWA" or "the Union") and the brief of the United States as *amicus curiae* demonstrate, at the time the National Labor Relations Act ("NLRA" or "the

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[1] *See Machinists Lodge 76 v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132, 146 n.7 (1976); *Woodmark Manufacturers v. NLRB*, 386 U.S. 612, 619 (1967); *Labor Board v. Drivers Local Union*, 362 U.S. 274, 289-90 (1960).

Act") was enacted, and again when the NLRA was amended by the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley"), the question of whether, and to what extent, unions should be left free to seek and secure union security agreements was hotly contested. Opinion in the 1947 Congress ranged from support for a ban on all such agreements to a desire to permit virtually all such agreements. Ultimately Congress, as Senator Taft put it, adopted a position "in the middle," 2 National Labor Relations Board, *Legislative History of the Labor-Management Relations Act of 1947*, at 1403: Congress banned the closed shop but, in § 8(a)(3), 29 U.S.C. § 158(a)(3), Congress permitted union-shop agreements which require all bargaining-unit employees to pay "the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership" in the union.

Because the question posed here was thus a specific focus of congressional attention, the instant case, like *Carpenters' Union*, "affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy" and that the "judicial function is confined to applying what Congress has enacted." 357 U.S. at 100. For that reason, the showing in the briefs of CWA and of the United States with respect to "what Congress enacted" suffices *in and of itself* to establish that the court below erred in holding that the Union had violated the NLRA by negotiating and enforcing a collective bargaining agreement which requires all bargaining unit employees to pay an amount equal to union dues to the Union.

The instant case also illustrates another important "truism," one that has received perhaps less attention in labor litigation. Legislatures need not, and usually do not, enact into law "neutral principles" and then give those principles their full sway. Rather, the legislative process "involves the balancing of competing values and

interests"; in "our democratic system [that] is the business of elected representatives." *Diamond v. Chakrabarty* 447 U.S. 303, 317 (1980).

That is precisely what Congress did in the LMRA with respect to the matter at issue here. Congress confronted a situation in which the associational interest of the majority conflicts with the non-associational interest of a minority of employees, and in which there is a strong public interest in a labor relations system that furthers industrial peace and stability. Congress sought to harmonize these seemingly irreconcilable interests through a careful compromise which provides important protections to individuals who are not and do not wish to become union members but which, within the congressionally-established limits—and within the limits of state law (which Congress opted not to disturb)—leaves union members and their unions free to pursue majority interests through the give-and-take of collective bargaining.[2]

As the Court stated in *Machinists Local v. Labor Board*, 362 U.S. 411, 418 n.7 (1960):

> It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly.

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[2] Because Congress did not itself impose any obligations on nonmembers but left that for private decisionmaking and state regulation subject to federal liimtations, no constitutional rights of *nonmembers* are implicated by anything Congress did. The briefs of the CWA and of the United States so demonstrate.

Against that background, in addressing the issues posed here it is useful, we believe, to bear in mind both the extent to which Congress has safeguarded the interests of nonmembers and also the important considerations which support Congress' decision, in shaping the LMRA, not to extend further protection to such individuals. The AFL-CIO submits this brief to make clear what Congress has done in this area and the practical wisdom of Congress' decisions.

B. In several different respects, both the NLRA, as amended by the LMRA, and also the subsequently-enacted Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et. seq.* ("LMRDA"), limit what can be demanded of nonmembers and extend significant rights to nonmembers as against unions.

To begin with, in enacting the LMRA, Congress placed important constraints on the freedom of unions to negotiate union security agreements and thus limited the situations in which a union may impose *any* obligations on nonmembers. Prior to 1935 a union with a strong enough position in a labor market was free to negotiate a union security agreement with any employer in that market, regardless of the wishes of the employees of that employer; by securing such agreements unions were then able to foreclose nonmmebers from employment with the signatory employers. Section 8(3) of the original Wagner Act, and § 8(a)(3) of the Taft-Hartley Act, put an end to that practice by permitting union security agreements only where the employees, by majority vote in a unit deemed by the National Labor Relations Board to be "appropriate" for collective bargaining, choose the union to be their representative.

Moreover, under the Act a "unit" is "appropriate" for these purposes only if all of the employes in the group "share a 'community of interest.'" *NLRB v. Action Automotive*, —— U.S. ——, 53 L.W. 4131, 4133 (Feb.

19, 1985). This "community of interest" test "prevents a functionally distinct minority group of employees from being submerged in an overly large unit." *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 172 (1971). Thus individuals who do not wish to support a union can be obligated to do so only if a more-or-less homogeneous group of which such individuals are a part decides democratically that all members of the group should owe such obligations.

Second, where these conditions are satisfied and where state law permits some form of union secuirty agreement, the LMRA, in the interest of nonmembers, limits what the majority and their union may demand. A union may not, for example, foreclose nonmembers from securing jobs with an organized employer; unlike the Wagner Act, the LMRA permits a majority union to negotiate only a "union shop" and not a "closed shop." Nor may a union seek to obtain the same result as that obtained through the closed shop indirectly by negotiating a union shop agreement and then maintaining a "closed" union; by its terms, § 8(a)(3) forbids a union from enforcing a union security clause against an individual who is denied membership "for some reasons other than the failure of the employee to tender the periodic dues and the initiations fees uniformly required as a condition of acquiring or retaining membership." [3]

Furthermore, in *NLRB v. General Motors*, 373 U.S. 734 (1963), the Court interpreted the language just quoted to mean that a union may not even demand that a nonmember agree to join the union and thus become subject to the unions' rules and regulations. Rather, under *General Motors* all that can be demanded of the nonmember is that he pay dues.

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[3] Unions also are prohibited from charging initiation fees in amounts that effectively "close" the union; NLRA § 8(b)(5), 29 U.S.C. § 158(b)(5) proscribes initiation fees which are "excessive or discriminatory."

Third, as § 8(a)(3)'s language makes clear, the LMRA limits what may be required of the nonmember by way of dues. Specifically, the nonmember can be charged no more than "the periodic dues and initiation fee uniformly required as a condition of . . . membership." This limitation is particularly significant because, under § 101(a)(3) of the LMRDA, 29 U.S.C. § 411(a)(3), the dues charged to members must be determined by the members either directly through referendum vote, or, in the case of national unions, through the vote of elected representatives. In other words, nonmembers can be charged only that which members themselves—through democratic processes—agree to pay. And one of the major premises of our governmental system is that such a political process provides "in general a sufficient security against erroneous and oppressive taxation" because "[i]n imposing the tax the legislature acts upon its constituents." *McCulloch v. Maryland*, 4 U.S. (Wheat.) 316, 428 (1819).

Fourth, federal law seeks to assure that the dues unions receive (both from members and nonmembers) will be used to forward the interests of those the union represents. That is, in essence, the point of the entire LMRDA: "to ensure that unions would be democratically governed." *Finnegan v. Leu*, 456 U.S. 431, 441 (1982). And LMRDA § 501, 29 U.S.C. § 501, provides particular protection in this regard by declaring that union officers who hold union monies "occupy positions of trust" and are obligated to expend the money "solely for the benefit of the organization" and not for personal gain.

Fifth, recognizing that in one particular the individual intersts of employees in an organized unit are of such moment as to require special protection, LMRA § 304, and its successor, § 321 of the Federal Election Campaign Act, 2 U.S.C. § 441(b), prohibit unions from using dues money to make political contributions or expenditures in federal elections. Many states have enacted like prohibition with respect to state elections. Thus, to a large

extent, nonmembers cannot be required to support the union's political activities.

Sixth, and finally, the NLRA assures nonmembers who may be required to support a union that their interests will be fairly represented by that union. Even though it may be greatly in its institutional interst to do so, a union may not use its collective strength to secure higher wages and greater benefits for its members than for nonmembers or to otherwise aggrandize the position of the majority at the expense of the minority. NLRA § 8(b)(1) & (b)(2) and the duty of fair representations all prevent the union from using its authority to gain for its supporters the type of preferences through which popularly elected representatives normally seek to solidify their political standing.

In sum, the national labor policy does not leave persons who oppose unionization at the "mercy" of unions; rather federal law grants such individuals important rights with respect to what can be demanded of them (and under what circumstance) and what they may demand in return.

B. At the same time, the statutory scheme Congress crafted protects the interests of the majority by leaving the majority free to require that all those in the bargaining unit provide the same quantum of financial support to the union. A union represents—indeed, as we have seen, must represent—all employees within the bargaining unit, and seeks to advance their interests as employees in a variety of ways, through collective bargaining, through ancillary actions designed to strengthen the union's hand in bargaining, *see* pp. 14-15 *infra*, and through supplementary actions away from the bargaining table. The union's accomplishments in these regards necessarily redound to the benefit of all members of the unit; that is true not only of what is achieved in negotations with respect to wages and working conditions but

also of what is achieved through work in the legislative arena, the judicial arena, or elsewhere.

Congress' judgment to permit agreements under which all persons in the bargaining unit pay the cost of these activities allows for the classic solution for "pricing" a "public good," *viz.*, a "good" whose benefit flows to all persons in a polity whether or not the person purchases the good. The market cannot work to finance such goods because each individual knows that he or she will benefit from the group activity whether or not he or she contributes to the cost. Accordingly, the appropriate economic solution is to empower everyone benefitted to vote on how much to expend for the beneficial activity. "Individuals, knowing that they must comply with the decision made by the collective choice or voting process, will find it in their interest to vote for that solution which will move the outcome closer to their own desires . . ." R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice*, 55-56 (1976).

To engraft upon this scheme a right for objecting employees to refuse to contribute to activities "not germane to the union's duties as collective bargaining agent," *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984), would upset the careful balance Congress struck between majority and minority rights. This is true in at least three respects.

1. The first difficulty that inheres in any system in which conscientious objectors are exempted from an obligation owed by all others in the polity is the task of identifying those objectors. Human nature being what it is, a rule that grants a discount to anyone claiming an objection to paying union dues inevitably will tempt some to assert an objection for the cost savings that result, for bargaining leverage in getting his way on any of a hundred demands that could be made on the union, or as a sanction against the union for refusing to accede to a

particular demand. The numbers doing so can be expected to increase as the size of the discount increases.

The problem is exacerbated by the limited ability of unions and courts to separate *bona fide* objectors from opportunists; "[i]t is not within 'the judicial function and judicial competence'" to determine whose objections are based on genuine demands of conscience. *United States v. Lee*, 455 U.S. 252, 257 (1982).[4] It is in part for this reason that the Court has rejected the contention that the First Amendment grants religious objectors a constitutional exemption from income tax obligations. *See United States v. Lee, supra; see also Bowen v. Roy*, —— U.S. ——, 54 L.W. 4603, 4607 (June 11, 1986) (opinion of Burger, C.J.).

Had Congress granted objectors a privilege to pay less than full union dues, then, Congress would have created a financial incentive for the assertion of objections. Such a financial incentive would have affected not only the overall financial situation of unions but also, in particular, the ability of unions to undertake activities which generate the right to make an objection since every dollar spent on such activities increases the discount available to objectors and thus increases the incentive to object. That financial incentive would, in addition, have a potent effect on the union's internal affairs by increasing the ability of fervid minority factions to force the majority to bend to their will. Finally such an approach would be contrary to the interest in industrial peace because of the tensions that would be created by a rule which required the majority to accord the minority all the employment benefits achieved by group action but

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[4] *Cf. Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977) (objectors cannot be required to specify the particular expenses to which they object because doing so would impinge upon objectors "freedom to maintain his own beliefs without public disclosure").

which deviated from the rule of equality in determining how the groups activity will be financed.

2. The second difficulty that inheres in nay regime in which objectors are required to support only those activities which are "germane to the union's duties as collective bargaining agent"—*viz.*, "activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative," *Ellis*, 466 U.S. at 448—is that ultimately the courts must put their own gloss on what the union's "duties" consist of and must determine which activities are "reasonably undertaken" to effectuate those duties. That is not a task for which courts (or government generally) are well-suited; the unhappy history of standardles, judicial superintendence of the affairs of labor unions provides ample support for Congress' disclination to reassign that responsibility to outsiders.

There are a vast array of activities which a union may choose to pursue with the ultimate aim of enhancing the economic situation of those the union represents. A union may, for example, seek to achieve greater internal cohesion and strength through a program of membership education or even social activities. A union may seek to strengthen itself by developing alliances with potential supporters, domestic or foreign, inside the labor movement or without. A union may, in anticipation of employer opposition, seek to improve public support for its collective bargaining position through a program of public education and public relations. A union may attempt to improve the economic climate for collective bargaining negotiations by seeking to persuade the government to follow macroeconomic policies of one sort or another. Or a union may focus on the microeconomic level by attempting to organize employees of competing employers, recognizing that the wages of employees of any one employer "are bound to be affected by the standard of wages of their trade in the neighborhood," *American Steel*

Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921).

The foregoing list of options could, of course, be even more extended. The fundamental point is this: unions confront a changing world and a dynamic economy in which collective bargaining results are determined not in a hermetically-sealed container but by a host of interrelated factors which run far beyond the particular employer or employers on the other side of the bargaining table. As a practical matter, the one option a union does not have is to put all its time, effort, energy and resources into direct collective bargaining and contract administration in the narrow sense of those terms, for a union that does so is certain in the relatively short run to fail.

Because the judgments a union must make among its available options such as those we have listed are intensely practical ones that cannot be captured in any rote formula—judgments, in other words, that are complex and indeterminate—there is no principle of law by which the courts can determine which activities have a close enough tie to collective-bargaining to be deemed "reasonably employed to implement or effectuate the duties of the union as exclusive representative." P. 14 *supra*. Whether a particular activity is important enough in furthering the bargaining unit employees interests as employees to be worth the expenditure is therefore most appropriately decided by the union members themselves through the union's democratic processes.

The dangers inherent in entrusting such judgments to judges are apparent from the "free-wheeling judicial exercise" in regulating unions of the period through 1935. *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383 (1969). As this Court has observed, that judge-made law "was based on self-mesmerized views of economic and social theory," and was "clear[ly] disapprov[ed]" by Congress in fashioning the national labor policy. *Id.* at 382-83. Congress enacted a set of *statutory* rules to de-

limit the rights of employers, employees and unions precisely to take from the courts the principal responsibility for defining labor policy. And Congress specifically declined to regulate the level of dues charged by unions or the uses made of dues money so as to avoid outside intrusions into internal union affairs. Had Congress granted special rights to objectors and thereby empowered the courts (or some other agency of government) to decide which activities of unions are "germane" and which are not, Congress would have substantially deviated from its general plan and subjected unions, to a significant degree, to governmental oversight.

The instant case provides the most graphic illustration yet of the degree of judicial oversight of internal union affairs that is necessarily required under a regime in which objectors are obligated to contribute only to "germane" union activates. Through its democratic processes the members of CWA decided to pursue and to fund (from their wages) an array of activities away from the bargaining table. The elected president of the CWA testified that, in his view, "expenditures for legislative purposes, for contributions and the lke are 'germane' to collective bargaining in that they 'strengthen the hand,' as it were, of the Union when actual collective bargaining procedures begin . . ." Pet. App. 254a-55a. Two expert witnesses—Dr. Willard Wirtz, former Secretary of Labor, and Dr. Walter Galenson, Professor of Economics and Industrial Relations at Cornell University—generally concurred. *Id.* at 255a.

The Special Master and the District Court disagreed, however, and held that the CWA is not permitted to pursue its vision as to how best to improve its collective-bargaining position, or at least was not free to do so with the dues of objectors. And having rejected the Union's own judgment as to how to "effectuate the duties of the union as exclusive representative," the Special Master embarked upon his own independent assessment of each item of union activity, stating that while it was "impracticable, if not impossible, to fashion an applicable rule or

guide . . . in regard to permissibility [of particular expenditures] . . . like obscenity, [the Special Master] 'knows it when he sees it.'" *Id.* at 257a.

Our point is not to fault the Special Master for his approach to this case. To the contrary, we believe that his decision illustrates the inherent difficulties in assigning to the courts the task of separating "germane" from "non-germane" activities. We point to the Special Master's decision thus to illustrate the wisdom of Congress in permitting unions to require all members of an organized bargaining unit to pay to the union an amount equal to union dues, rather than in extending special rights to objectors to pay a lesser amount.

3. There is a third consideration that further supports Congress' decision not to grant objectors a right to refuse to contribute to certain union activities: such a right necessarily carries with it large transactions costs—costs which have proven to be quite high and which reduce the resources available to unions to perform their principal mission, that of advancing the employment interests of the workers the union represents.

(a) The starting point for analysis is the recognition that the concept of "germane" and "non-germane" expenditures is a *legal* concept of highly particularized significance, and not a bookkeeping or accounting concept of general utility to unions in ordering their affairs in a rational and efficient manner. In the normal course, therefore, unions have no occasion to maintain their books and records in such a way as to separate out germane and non-germane expenditures, or even to maintain books and records in such a way that the separation can be readily made.

Thus, as the Special Master here found, prior to the decision below "CWA maintain[ed] an elaborate system of books of accounts with some 63 different account numbers." Pet. App. at 252. But CWA "did not maintain its books and records on the basis of allocating all of its

expenditures between collective bargaining, contract administration and grievance adjustment, on the one hand"—the only activities the Special Master deemed "germane"—and "all other expenditures on the other." *Id.* Consequently, in an effort to demonstrate the proportion of its dues income that it expended on germane activities (and thus the proportion of plaintiffs' dues that CWA was entitled to retain) CWA was forced to attempt to allocate its expenditures based on a record-keeping system that was established for different purposes altogether. Doing so, in the Special Master's judgment, "was like trying to make a 'frog fly,'" Pet. App. at 253a, and it was his conclusion that

> [b]ecause of the lack of required data to support a number of attempted allocations—many involving substantial amounts of money—the Special Master was required to hold such expenditures to be impermissible [*i.e.* not chargeable to objecting employees] in whole or in part, so that ultimatley 81 percent of CWA expenditures were held to be impermissible and 19 percent permissible. [*Id.* at 170a]

Thus, a rule allowing a union to charge objectors only for "germane" activities necessarily requires the union to establish a system that permits the segregation of germane and non-germane expenditures and then to do the financial analysis each year to determine the proportion of expenditures devoted to germane activities. Indeed, since most unions are divided into locals, intermediate bodies, and a national parent body—each of which is entitled under the union's constitution to a share of each dues dollar and each of which operates separately and keeps its own books and records—normally *three* such systems must be devised and *three* such analyses must be made yearly with respect to each objector. In the instant case, for example, CWA retained a statistician and two certified public accountants to develop such a system for the Union and CWA continues to be required to retain outside experts to review the operation of that system and

to perform and verify the required calculations each year. *See* Pet. App. at 174a-198a.

A simple illustration may help explain the problem unions face in separating germane and non-germane activities and the burdens entailed in attempting to doing so. Most unions expend money to secure legal services. Larger unions tend to have an in-house legal department, as well as outside counsel, while smaller unions more frequently will have only outside counsel who are either paid a retainer or an hourly fee for services rendered to the union. Assuming a union maintains its financial records on a departmental or functional basis, the union's regular record-keeping system will enable the union to determine at the end of each fiscal year the expenditures for its legal department or for legal services generally.[5]

In *Ellis*, however, this Court concluded that § 2, Eleventh of the Railway Labor Act, 49 U.S.C. § 152, Eleventh, does not permit unions covered by that Act to charge objecting employees for all legal expenses.[6] In particular, the Court held:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are

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[5] A union which maintains an in-house legal department will be able to ascertain the total cost of that department only if the union's records show, *e.g.*, the cost of the supplies consumed by the legal department, the cost of services (such as printers, messengers, overnight mail delivery) used by the department, and the professional and non-professional salaries of personnel in the department. Needless to say, not all unions elect to maintain their records on this basis (as opposed to, *e.g.*, maintaining a single line for supplies used by all departments, a single line for all printing bills etc.).

[6] The Court in *Ellis* expressly declined to decide whether the First Amendment permits a union to charge objectors for all legal expenses. *See* 466 U.S. at 455; *see also Teachers v. Hudson*, —— U.S. ——, 54 L.W. 3231, 3235 n.13 (March .., 1986) (declining to decide whether First Amendment prohibits charging objectors for "non-germane, non-idelogical expenditures").

> clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, or jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining-unit employees and is normally conducted by the exclusive representative. The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees. [466 U.S. at 453].

On that basis the Court concluded that, "unless the Western Airlines bargaining unit is directly concerned" in a particular piece of litigation, the objecting employees in that case, who worked for Western Airlines

> need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact [under which all airlines agree to share revenues with any airline which is the subject of a strike]; of litigation seeking to protect the right of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII. [*Id.*].

If NLRA unions were to be faced with the same obligations that *Ellis* imposes on RLA unions, each NLRA union would be required to maintain its financial records in such a form as to enable the union to separate out, for each represented bargaining unit, the costs of litigation in which the "bargaining unit is directly concerned" from litigation "not having . . . a connection with the bargaining unit." This would mean, in the first instance, that each such union would be compelled to develop a new record-keeping system from which the purpose of each litigation expenditure could be determined. Moreover, because such systems are not self-executing, each union would be required to assign or retain someone each year to review the litigation expenditures to determine separately for each bargaining unit represented by the union

the amount expended on litigation "germane" to that unit. The cost of developing, maintaining, and annually analyzing these records for each unit within the union (*viz.*, the national and each of its locals and intermediate bodies) and for each bargaining unit undeniably would be significant, and would be incurred for no reason other than to enable the union to comply with the obligation not to charge objectors for "non-germane" activities.

Similarly, although *Ellis* recognizes that a union "must have a channel for communicating with the employees, including the objecting ones, about its activities," the Court concluded that the RLA permits unions to charge objectors only "for reporting to them about those activities it can charge them for doing"; "[i]f the union cannot spend dissenters' funds for a particular activity it has no justification for spending their funds for writing about that activity." *Id.* at 450-51. If a like rule were imposed on NLRA unions, each such union which negotiates a union security agreement (and, again, each local and each intermediate body that shares in an objector's dues) would need to determine annually what portion of the cost of each union newspaper (or other union publication) is attributable to reporting about germane activities.

(b) The record-keeping burdens described above are complicated still further by the fact that because unions provide a labor-intensive service—representation—the largest proportion of virtually every union's budget goes for employee compensation. Most elected union officers and many appointed union employees engage in a range of activity, some of which is chargeable to objectors and other of which may not be. For example, a business agent or field representative may spend part of his day on collective bargaining, part on contract administration, part in organizing a new unit, and part on political or community-service activities. A union lawyer provides legal advice with respect to both germane and non-germane activities of the union, and the lawyer may engage in both

germane and non-germane litigation. A union researcher, publicist, or librarian provides assistance to bargainers and to lobbyists. And the union's newspaper writers will cover both types of activities.

The upshot of all this is that a union will be completely confident of its ability to establish to the satisfaction of a third party the proportion of its expenditures devoted to germane activities only if the union institutes some form of time keeping for its multi-purpose officers and employees so as to be able to prove how these individuals spend their work time. Indeed in the instant case the Special Master expressly faulted the Union because it "did not establish a system for the keeping of contemporaneous time sheets by its upper echelon officers and employees, indicating the function for which such time was expended, so that the Union would have some credible basis for meeting its burden of proof." Pet. App. 272a, The Special Master observed that "[s]uch a system has been established rather generally in the legal profession, whose members frequently charge their fees on the basis of their professional services supplied their clients, and there does not appear to be any substantial difficulty in establishing such a system for unions as well." *Id.*

Instituting a system of time-recording for a large number of lay union representatives, who never have been required to record how they spend their work time and who do little paperwork generally, is, of course, far more difficult than establishing such a system for professionals for whom time recording is second nature. In all events at least this much is clear: requiring unions to develop such records and to analyze them annually would cause the unions to incur substantial new costs solely to be able to defend the charges made to objectors.

(c) To this point we have focused solely on the internal costs that a union which is permitted to charge objectors only for germane activities would incur to establish and operate a system that will enable the

union to separate germane from non-germane expenditures. But those costs are only a piece—indeed in many instances a relatively small piece—of the total burden that faces a union which must operate under such a limitation on what the union may charge objectors. For if objectors are given a right not to contribute to non-germane activities, the objectors likewise must be given the right to challenge the union's determination of what proportion of its expenditures are germane. And the experience of public sector and RLA unions proves that the costs of such litigation outweigh even the heavy record-keeping costs described above.

In order to understand the litigation burdens that, as a practical matter, would inevitably follow a ruling permitting NLRA unions to charge objectors only for "germane" activities, three factors must be kept in mind.

First, although, as a general rule, relatively few employees in organized bargaining units object to paying full union dues, each unit is likely to have a few such objectors. These individuals may hold deep-seated ideological objections towards the concept of unionization in general or may be antagonistic towards the particular union that serves as their representative. Thus, in any unit there is likely to be at least a handful of individuals willing, indeed eager, to serve as plaintiffs in contesting any action of the union, including the level of dues charged to objectors.

Second, from time to time in the history of a bargaining unit, disputes arise between rival unions or between rival political factions within a single union. When this occurs, the potential is great for litigation brought by those who oppose the incumbent union or its leadership. In such instances "objectors" can use a means close at hand to pursue concerns wholly separate from those envisioned in creating the right to object.

Third, whereas the litigation system is grounded on the assumption that, in general, litigants will not bring

cases where the cost of litigation exceeds the amount at issue, that assumption is invalid with respect to "objector litigation." Ideological suits always constitute a special class and in this instance such litigation has been fueled by the National Right To Work Committee and its litigation arm, the National Right to Work Legal Defense and Education Foundation which provide free legal assistance to employees willing to attack union security agreements.[7] The ultimate aim of objectors and their legal supporters are obviously furthered when unions are forced to shoulder litigation costs which are out of proportion to the amount of dues owed to the unions by objectors. Indeed, in this very case—which has been litigated for over ten years, and involved 27 hearing days, six district court opinions, and two opinions by a special master—the maximum dues charge to any plaintiff was under $200 per year and the 80% rebate the district court ordered (because of the inadequacy of CWA's records for the years prior to 1983) provided plaintiffs with recoveries for a seven-year period ranging from $87 to a maximum of $1252. *See* Pet. App. 107a, 310a.

In light of all these factors it is not at all surprising that, notwithstanding the small financial stakes involved,

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[7] The National Right to Work Committee "was organized in 1955 by a group of employers," *UAW v. National Right to Work Legal Defense and Education Foundation, Inc.*, 781 F.2d 928, 929 (D.C. Cir. 1986); its stated purpose is to "oppose[] compulsory unionism through various activities," *UAW v. National Right to Work Committee*, 590 F.2d 1139, 1143 (D.C. Cir. 1978). In 1968 the Committee created the National Right to Work Legal Defense and Education Foundation for "the principal purpose of providing financial assistance to workers who bring lawsuits attacking features of 'compulsory unionism.'" *Id.* The Foundation in large part funds objector litigation with monies contributed by employers; indeed the Foundation's counsel has testified that without employer contributions "the effectiveness of litigation against unions, for practical purposes, is completely destroyed." *UAW v. National Right to Work Foundation*, No. 839-73 (D.D.C.) (Hearing of Oct. 4, 1973, Tr. 2).

unions in the public and RLA sectors have found themselves barraged by litigation brought on behalf of objectors challenging both the procedures established by the union for collecting fees from objectors and also the union's calculation as to the amount of the advance reduction in dues to which objectors are entitled. Nor is it surprising that this litigation has proven to be costly and complex, taxing union resources to and beyond their limits.[8]

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[8] This Court's decision in *Teachers v. Hudson, supra*, has spawned a new generation of objector litigation of two discrete types.

First, unions have been faced with a rash of "procedural" lawsuits challenging, *e.g.*, the notice afforded to "potential objectors" with respect to "the propriety of the union's fee," *Hudson*, 54 L.W. at 4235; the "verification by an independent auditor" of the union's "major category of expenses," *id.* at 4235 n.18, and the internal procedures established by the union to adjudicate the objector's challenges "in an expeditious, fair, and objective manner," *id.* at 4235. *See, e.g., Andrews v. Education Ass'n*, No. 87-7225 (2d Cir., pending); *George v. Baltimore City Public Schools*, No. R 87-866 (D. Md.); *Grunwald v. San Bernardino City Unit School District*, No. 87-3381 (C.D. Cal. June 19, 1987); *Cripe v. Illinois Education Labor Relations Board*, No. 87-3214 (C.D. Ill.); *Gilpin v. AFSCME*, 643 F. Supp. 733 (C.D. Ill. 1986). No aspect of the procedures developed by unions has proven immune from challenge; even those unions which have allowed the American Arbitration Association to choose the arbitrator who will resolve objections have been sued on the ground that that organization is not "impartial." *See Andrews v. Educ. Ass'n, supra.*

Second, to comply with the requirement of a "reasonably prompt decision by an impartial decisionmaker," *Hudson*, 54 L.W. at 4236, public sector and RLA unions now face annual arbitrations or annual hearings before state administrative agencies to justify the charges made to objectors. To our knowledge, unions have been uniformly successful in proving that they correctly calculated their germane expenditures and that those expenditures constitute on the order of 80% to 90% of the union's total expenditures from dues income. *E.g., Denham and AFSCME District Council 31*, AAA No. 51 673 001 861 (Arbitrator Duda, Nov. 29, 1986); *Chicago Fire Fighters Union*, AAA No. 51 390 0479 85 B (Arbitrator Briggs, Oct. 4, 1986); *Service Employees Local 46* (Arbitrator Nathan, March 18, 1987); *United University Professors*,

C. The short of the matter is this: the showing of CWA and of the United States that Congress decided to leave unions free to negotiate union security agreements requring all bargaining-unit employees to pay an amount equal to union dues is, in and of itself, dispositive here without regard to Congress' wisdom or lack of wisdom. *See* pp. 5-7 *supra*. But even if such policy matters were relevant to the judicial function, the fact of the matter is that Congress has soundly balanced competing interests and arrived at an accommodation which affords significant protections to objectors yet at the same time avoids the degree of outside oversight and the high transaction costs that would necessarily follow if objectors were afforded the right to refuse to contribute to non-germane activities.

CONCLUSION

For the foregoing reasons, and those stated in the brief of petitioners and of the United States, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AAA No. 15 673 0002 87 (March 20, 1987); In *re Judy Gender*, No. 85-FSC-320-A (Minn. PERB, Feb. 27, 1987); *Brotherhood of Railway Clerks*, AAA 18 673 0001 85 (Arbitrator Sirefman, Dec. 29, 1986); *California State Employee Association*, AAA 74 673 001 86 (Arbitrator Richman, Feb. 2, 1987); *Teamsters Local 726*, AAA 51 673 0001 870 (Arbitrator Molinowski, May 4, 1987); *New Jersey Education Association*, AAA 18 673 0001 875 (Arbitrator Mitrani, April 23, 1987); *Indiana Teachers*, AAA 52 673 0001 86 (Arbitrator Duda, Feb. 6, 1987).